whipped. Then the whipping should be done in the magistrate's presence in a closed court-house. There should be present only the magistrate, the accused and the person who is going to execute the order of whipping and if necessary the medical officer.

In this case the accused appeared to be 19 years old at the time of the carrying out the sentence of whipping. Presumably the order of whipping was under section 293(i)(c) of the Criminal Procedure Code (Cap. 6). This section deals with youthful offenders only. "Youthful offender" is defined in section 2 of the Criminal Procedure Code (Cap. 6) as a child who is above the age of 7 and under the age of 16 years. Therefore the magistrate was wrong to order whipping under section 293(i)(c) of the Criminal Procedure Code (Cap. 6) in respect of an accused person of 19 years of age. Now section 6(1) of the Ordinance states *inter alia* that on conviction be *liable* to imprisonment for a term not exceeding two years and to whipping. My interpretation of this section is that the term of imprisonment is not mandatory and a fine may be imposed in lieu of imprisonment. In exercise of my powers of revision I enhance the sentence by imposing a fine of $50 in default 3 months imprisonment. The sentence of whipping to stand. I also direct that the charge be amended by deleting the letter '(a)' after "section 6(1)".

Order accordingly.

RE MARIA MENADO

[O.C.J. (Winslow J.) May 6, 1964]

[Singapore — Originating Motion No. 5 of 1964]

Practice and Procedure — Shariah Court — Process of Court — Substituted service outside State — Whether service valid — Whether appearance to contest amounts to submission to jurisdiction — Muslims Ordinance, 1957, ss. 26, 27 — Muslim Marriage and Divorce Rules, 1959, r. 27.

Muslims Ordinance, 1957, s. 26 — Shariah Court — Jurisdiction of President — Order of prohibition against President.

Section 26 of the Muslims Ordinance, 1957, provides:

"(1) Process of the court shall be served by an officer of the court or by any other person expressly authorised by the court to serve the same, and may be served at any place within the Colony.

(2) Service shall be personal, unless for special reasons the court shall order substituted service. Substituted service shall be effected in such manner as the court may order and shall then be as effective as personal service.

(3) Personal service shall be effected by handing to the person to be served the original or a sealed and signed copy of the document to be served. If the person to be served refuses to accept a document it may be brought to his notice and left near him.

(4) A person who has served any document or proceeding shall forthwith file in court a memorandum showing the place, time and method of service.

(5) Service shall be proved where necessary by oral evidence."

Rule 27 of the Muslim Marriage and Divorce Rules states: "In matters of practice and procedure not expressly provided for in these rules, the court may adopt the practice and procedure in civil proceedings for the time being in force in the Civil District Courts."

This was an application for an order of prohibition to be directed to the learned president of the Shariah court to prohibit the said court from proceeding with the hearing of a summons based on the purported service of the said summons pursuant to an order of substituted service outside the State made by the said learned president on March 13, 1964.

Held: substituted service can only be effected and become effective within the State because section 26 of the Muslims Ordinance expressly limits the area of service to the territorial confines of the State and this jurisdiction was not enlarged by rule 27 of the Muslim Marriage and Divorce Rules. Prohibition to lie.

Per Winslow J.: "The result of my decision may be to deprive male Muslims of the immediate and effective pursuit of their remedies within the State, in cases where their spouses have decided to leave the jurisdiction by deliberately crossing the causeway. It may perhaps be some solace to reflect that it is unlikely that little more than a very few women will normally find themselves entrenched in the sacrosanct position which the applicant at present appears to enjoy and correspondingly few men are accordingly likely to be affected, in any adverse manner, by the caprice of their itinerant spouses."

Cases referred to:—

(1) *In re King & Co.'s Trade-Mark* [1892] 2 Ch. 462, 483.

(2) *De Gasquet James* v. *Mecklenburg-Schwerin* [1914] P. 53, 64.

(3) *Harris* v. *Taylor* [1915] 2 K.B. 580.

(4) *In re Dulles' Settlement (No. 2)* [1951] Ch. 842.

APPLICATION FOR ORDER OF PROHIBITION.

David Marshall (*J. B. Jeyaretnam* with him) for the applicant.

Tan Boon Teik (Solicitor-General) for the respondent.

Cur. Adv. Vult.

Winslow J.: The applicant in this case asks for an order of prohibition to be directed to the learned president of the Shariah Court to prohibit the said court from proceeding with the hearing of Shariah Court Summons No. 7 of 1964 based on the purported service of the said summons pursuant to an order for substituted service outside the State made by him on 13th March 1964.

The Muslims Ordinance (No. 25 of 1957) makes no direct provision for service outside the jurisdiction of a summons of this nature by the Shariah Court and I am asked by the learned Solicitor-General to hold that, where the provisions of the Ordinance are not exhaustive as to procedural matters, recourse may be had to the law of Islam.

I can find no authority to support this proposition, much as I should like to find one. If indeed there is merit in this contention, it is surprising that special provisions without qualification were enacted for the procedure to be followed in the Shariah Court which was specially created by that Ordinance. Furthermore, if it had been the intention of the legislature so to provide, it would have been a comparatively easy matter to incorporate a section similar to section 27, which relates to evidence, requiring the provisions of the law of Islam to be observed in all matters relating to procedure. It would also have been equally easy, in the alternative, to provide for a reference to be made to the law of Islam in all those procedural matters for which the Ordinance had not expressly provided.

Section 26 of the Muslims Ordinance provides that process of the Shariah Court may be served at any place within the State and that such service shall be personal unless for special reasons the court shall order substituted service. It then goes on to provide that substituted service shall be effected in such manner as the court may order and shall then be as effective as personal service. It would appear therefore that substituted service can only be effected and become effective within the State, because to hold otherwise would be to assume that personal service can be effected outside the State which however the Ordinance does not permit.

Further provisions are made by the Muslim Marriage and Divorce Rules 1959. for the procedure to be followed in the Shariah Court. Various procedural details for the purpose of carrying out the provisions of the ordinance are spelt out in these Rules, rule 27 of which provides as follows:—

"In matters of practice and procedure not expressly provided for in these Rules, the court may adopt the practice and procedure in civil proceedings for the time being in force in the Civil District Courts.".

One may pause here to observe that the inclusion of a rule of this kind appears to explode the myth that, where the Ordinance is silent on procedure, reference may be made to the law of Islam. Counsel in the case and the learned president appear to have overlooked this rule.

Order 13 of the District Court Rules provides for service out of the jurisdiction in the case of certain specified actions. I do not think that it is necessary for me to decide whether the relief sought before the Shariah Court in the present case falls within the scope of Order 13, because I am of the view that rule 27 of the Muslim Marriage and Divorce Rules must be read subject to the provisions of the Muslims Ordinance, section 26 of which expressly limits the area of service to the territorial confines of the State. Any attempt to hold that rule 27 aforesaid enlarges the jurisdiction conferred by the Ordinance would tend to render that construction of the rule *ultra vires* the provisions of the Ordinance. If a section corresponding to rule 27 had been included in the Muslims Ordinance itself then, of course, no complaint could, perhaps, have been validly made, assuming that the relief sought for falls within the scope of Order 13, on which I express no opinion. Subsidiary legislation like these Rules, made under powers conferred by an Ordinance, should not, however, be inconsistent with the provisions of any Ordinance (vide section 23(c) of the Interpretation and General Clauses Ordinance (Cap. 2)). Nor can such rules be treated exactly as if they were contained in the Ordinance in the absence of a clear provision in the Ordinance to that effect. There is no such provision in the Ordinance nor is there any provision for annulment by the Legislative Assembly at its will after presentation thereto such as would enhance the legislative authority of these Rules and almost equate them to principal legislation and thereby perhaps preclude the courts from pronouncing on their reasonableness or validity.

I have therefore come to the conclusion that the learned president of the Shariah Court had no power to order the service of the summons outside the State in the manner in which he did. If he had no such power then he could not give himself jurisdiction to hear the case by exercising a power he never had. It should be observed that an irregular or indiscreet exercise of a power or jurisdiction which he did have would not make prohibition lie but here he was purporting to exercise a power or jurisdiction which he never had.

As Bowen L.J. said *In re King & Co.'s Trade-Mark* [1] —

"If service of the process of the court is necessary for the jurisdiction of the court, the court cannot, except so far as it is authorized by statute, order service abroad ....and if the statute, under which the proceedings in court are brought, does not make special provision for the service of the initial process which is to found the jurisdiction of the court abroad, you cannot serve that initial process abroad and so found the jurisdiction of the court.".

This was cited with approval by Sir Samuel Evans in *De Gasquet James* v. *Mecklenburg-Schwerin* [2] who concluded by quoting from the Master of the Rolls in another case to the effect that "The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit." It would seem therefore that the learned president of the Shariah Court acted in excess of the jurisdiction conferred on him. He could not found the jurisdiction of the Shariah Court by ordering service of the summons outside Singapore by advertisement in the newspapers in the

absence of a clear provision in the law empowering this or some other form of substituted service to be done outside the State.

Many cases were cited on the proposition that an order of prohibition will not lie where a mere defect or irregularity in procedure is involved. I think those cases can be distinguished for various reasons which I do not think I need, at this stage, set out in detail. Suffice it to say that those defects or irregularities did not cause or create an excess of jurisdiction as the patent defect in this case, in my opinion, clearly does. As I have said earlier, an irregularity or indiscretion in the exercise of jurisdiction does not necessarily amount to an excess of jurisdiction. In the present case there was no jurisdiction at all to serve the defendant outside the State and, as *Dicey* says in his "Conflict of Laws" 7th Edition at page 176, "Where a writ cannot legally be served upon a defendant, the court can exercise no jurisdiction over him."

It was also submitted that the applicant voluntarily submitted to the jurisdiction of the Shariah Court, through her counsel, who appeared before it under protest to apply to the learned president to set aside his order for substituted service.

The learned Solicitor-General relied, in an attractive argument, on the decision of the English Court of Appeal in *Harris* v. *Taylor*,[3] the facts in which case, he submitted, were on all fours with the present case and where the court held that the defendant, who had entered a conditional appearance, through his advocate, to the Manx court to contest its jurisdiction over him, had voluntarily submitted to the jurisdiction of that court. It should be noted, however, that the defendant in that case had been asked to file a motion to set aside the writ by the Manx court which he eventually did. No such step was, however, taken in the present case, counsel having merely appeared to protest the jurisdiction.

Harris v. *Taylor* must, of course, be confined to its particular facts and a careful examination of that case shows, as Lord Denning in *In re Dulles' Settlement (No. 2)*[4] found, that it "is an authority on *res judicata* in that the defendant was not allowed in our (English) courts to contest the service on him out of Manx jurisdiction; because that was a point that he had raised unsuccessfully in the Manx court, and he had not appealed against it. To that extent he had submitted to the jurisdiction of the Manx court and was not allowed to go back on it. But the case is no authority on what constitutes a submission to jurisdiction generally." *Dicey* concludes, at page 1022 of his Conflict of Laws, that "The rule may now be taken, therefore, to be that an appearance simply to contest the jurisdiction does not constitute submission."

Furthermore the legality of the service of the summons, involving as it does the question of jurisdiction, is still an issue in the present case here whereas it was *res judicata* in *Taylor's* case.

As Lord Denning said in *In re Dulles' Settlement (No. 2)* —

> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction.".

I have had some misgivings about the propriety of allowing the applicant, who is, and has, for some time, been outside the jurisdiction, to succeed on her present application when it would have been just as easy for her to make an appearance in the Shariah Court as she has done in this court for the purposes of the present application. She is, however, acting within her constitutional rights in protesting the jurisdiction of the Shariah Court and it would seem that, once a lack or excess of jurisdiction in the Shariah Court is shown, I have no discretion at all but to direct the order of prohibition to lie, whatever my views on her conduct may be.

The result of my decision may be to deprive male Muslims of the immediate and effective pursuit of their remedies within the State, in cases where their spouses have decided to leave the jurisdiction by deliberately crossing the Causeway. It may perhaps be some solace to reflect that it is unlikely that little more than a very few women will normally find themselves entrenched in the sacrosant position which the applicant at present appears to enjoy and correspondingly few men are accordingly likely to be affected, in any adverse manner, by the caprice of their itinerant spouses.

With a little reluctance and some regret I therefore have no alternative but to make the order in terms of the application which has been made based on the purported order for substituted service outside the State.

Order in terms. Application for costs by applicant refused. No order as to costs.